

SIANG GALAU

v.

ANG WAK HIONG

HIGH COURT, KUCHING
 DATUK CHONG SIEW FAI J.
 [CIVIL APPEAL NO. KG. 13 OF 1991]
 4 SEPTEMBER 1993

APPEAL: Time limits for filing and service of memorandum of appeal - Whether 14 days after service of Form 141, Subordinate Courts Rules 1980 - Consideration of O. 55 Rules of the High Court 1980 and O. 49 Subordinate Courts Rules 1980.

The appellant, through his advocate, filed and served the Memorandum of Appeal after the expiration of 14 days of the service of Form 141, Subordinate Courts Rules 1980 (SCR 1980) on his advocate. The issue that arose was whether the provisions of the rules of Court required the filing and service of the Memorandum of Appeal within 14 days from the date of service of Form 141 on the appellant through his advocate.

Held:

[1] Order 55 r. 2(1) & (2) of the Rules of the High Court 1980 require an appellant to file and serve the Memorandum of Appeal within 14 days from the date of service of Form 141 under O. 49 r. 2(4) or r. 2(3) of the SCR 1980. Reading O. 55 r. 2(1) & (2) of the Rules of the High Court 1980 in conjunction with O. 49 r. 2(4) of the SCR 1980 it is clear that the Memorandum of Appeal must be filed and a copy thereof served on the respondent within 14 days after service of Form 141 on the appellant who is represented by a solicitor.

[2] In the event, the Memorandum of Appeal in the present case was filed and served after the expiration of 14 days of the service of Form 141 on the appellant through his advocate and the preliminary point taken by Counsel for the respondent succeeds. As no extension of time was applied for and obtained for the late filing and service of the Memorandum of Appeal, the appellants appeal must fail.

[Appeal dismissed with costs].

Cases referred to:

Kuching Pharmacy Sdn Bhd v. JL Morison Son & Jones (M) Sdn Bhd [1990] 1 CLJ 508/[1990] 2 MLJ 170 (**not foll**)
Shafie b. Ahmad v. Hajjah Fatimah bt. Ahmad & 3 Ors. [1991] 3 CLJ 2217 (**not foll**)

a Elayachee v. Woo Siu Tip [1991] 3 MLJ 108 (**foll**)
Hj Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man [1990] 3 MLJ 45 (**refd**)
Mansor bin Sulaiman & Anor v. Liaw Ket Sang [1992] 3 CLJ 1726 (**foll**)
Shobri bin Hassan v. R.S. Ramalingam [1993] 3 CLJ 70 (**foll**)

b Legislation referred to:

Rules of the High Court 1980, O. 49 rr. 2(4), 3(1), 3(2), O. 55 rr. 2, 2(1), 3, 4(3)
 Subordinate Courts Rules 1980, O. 49 rr. 2(4), 3, 3(1), 3(2), 3A(1), 3A(4) Form 141

For the appellant - J.M. Lim; M/s. J.M Lim & Co.

c For the respondent - June Chan; M/s Satem, Sagah & Chai

JUDGMENT**Chong Siew Fai J:**

d At the commencement of the hearing of this appeal against the decision of the Magistrates' Court at Kuching striking out the defence and allowing the plaintiff to enter judgment in the sum of RM13,228.96 and damages to be assessed, Counsel for the respondent/plaintiff raised a preliminary point that the memorandum of appeal was filed and a copy thereof served on the respondent/plaintiff out of time, and no ground had been shown for the delay. As such, the appeal, it was submitted, should be dismissed. For the appellant/defendant, however, Counsel argued otherwise, contending that the filing and service thereof were within the permitted time.

f The undisputed facts, so far as are relevant to the point in issue, are as follows:

- g* (a) Both the appellant/defendant and the respondent/plaintiff were represented in the Magistrates' Court.
- (b) The ruling or judgment appealed against was given on 5 April 1991.
- (c) On 13 April 1991 the appellant/defendant through his advocate filed the notice of appeal.
- (d) On 7 May 1991 the appellant/defendant was through his advocate served with the notice notifying that notes of evidence and the grounds of judgment were ready (hereinafter referred to as Form 141).
- h* (e) The Memorandum of Appeal dated 31 May 1991 was filed with the High Court Registry on the same date it was dated, that is, 31 May 1991 and a copy thereof was served on the respondent/plaintiff through his advocate on the said same date, that is, 31 May 1991.
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In other words, the appellant/defendant through his advocate filed and served the Memorandum of Appeal after the expiration of 14 days of the service of Form 141 on his advocate.

The issue in dispute is simple, that is, does the provision of the rules require the filing and the service of the Memorandum of Appeal within 14 days from the date of service of Form 141 on the appellant/defendant through his advocate? If it does not, the filing and the service of the Memorandum of Appeal would have been within the permitted time; but if it does, then the filing and the service would have been out of time.

There are 2 lines of authorities. On the one side are cases like *Kuching Pharmacy Sdn Bhd v. JL Morison Son & Jones (M) Sdn Bhd*. [1990] 2 MLJ 170 and *Shafie b. Ahmad v. Hajjah Fatimah bt. Ahmad & 3 Ors.* [1991] 3 CLJ 2217 to the effect that an appellant who is represented has 6 weeks from the date of receipt of the notification from the Court appealed from that the certified copy of the notes of evidence and the grounds of judgment are ready within which to file a memorandum of appeal. On the other side are cases like *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108, *Hj Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45, *Mansor bin Sulaiman & Anor v. Liaw Ket Sang* [1992] 3 CLJ 1726 and *Shobri bin Hasan v. R.S. Ramalingam* [1993] 3 CLJ 70 holding that a represented appellant has 14 days from the date of receipt of Form 141. It should, however, be noted that *Hj Abdul Ghani's* case *supra*, was decided before Order 55 r.2 (1) of the Rules of the High Court 1980 was amended by PU(A) 462/90 which came into effect on 1 January 1991 i.e. decided before the words "under ... rule 2 sub-rule (4)" of Order 49 were added by the said PU (A) 462/90.

It must first be recognised that the filing and service of a memorandum of appeal constitute an essential part of the appeal procedure. Order 55 r. 4(3) of the Rules of the High Court 1980 provides that if the memorandum is not filed or served within the prescribed time and no sufficient ground is shown for the delay, the appeal may be dismissed. Also r. 3 of the said O. 55 makes the filing and the service of a notice of cross-appeal dependent upon the service of the memorandum of appeal. Besides, a memorandum of appeal drawn up according to the provisions of the rules would give appropriate notice to the respondent of the grounds of appeal to

a meet (see *Elayachee v. Woo Siu Tip supra*, @ p. 110 1st col. D - H; and Form 113A).

Secondly, it must be noted that the Memorandum of Appeal does not form part of the Appeal Record required to be filed and served. Order 49 r. 3A (1) of the Subordinate Courts Rules 1980 provides, inter alia that the appeal record shall contain copies of:

- b* (a) the relevant pleadings;
- (b) the notes of evidence;
- (c) the grounds of judgment, provided that
- c* (d) the decision;
- (e) the notice of appeal;
- (f) all documentary exhibits and other documents relevant for the appeal.

See also the similar provisions in r. 3(1) of the said O. 49 that applies to an unrepresented appellant or an appellant appealing as a poor person.

d Since a Memorandum of Appeal does not form part of the Appeal Record but is essential to an appeal, when has it to be filed and served? While not disputing that Form 141 was served on his firm on 7 May 1991 and that the Memorandum of Appeal dated 31 May 1991 in the instant case under appeal was filed and served on 31 May 1991, that is, more than 14 days but less than 6 weeks after service of Form 141, Counsel for the appellant/defendant submitted that the filing and service was within the permitted time, relying on *Kuching Pharmacy Sdn. Bhd. v. JL Morison Son & Jones (M) Sdn. Bhd.*, *supra* and *Shafie b Ahmad v. Hajjah Fatimah bt Ahmad & 3 Ors.*, *supra*. With respect, I find myself unable to agree with the contention.

e For reasons given below, I prefer *Elayachee v. Woo Siu Tip, supra*, line of decisions to that of *Kuching Pharmacy Sdn. Bhd. v. JL Morison Son & Jones (M) Sdn. Bhd.*, *supra*, and the others. Order 55 r. 2 of the Rules of the High Court provides:

- g* 2(1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under O. 49 r. 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be) file in the High Court in duplicate a memorandum of appeal in Form 113A.
- h* (2) The appellant shall within the like period serve each respondent with a copy of such
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memorandum and a copy of the appeal record.

Thus O. 55 r. 2(1) and (2) quoted above require and appellant to file and serve the Memorandum of Appeal within 14 days from the service of Form 141 under O. 49 r. 2(4) or O. 49 r. 3 (2) of the Subordinate Courts Rules 1980.

Now, although O. 49 r. 3 of the Subordinate Courts Rules applies to appellants who are not represented by advocates or who appeal as poor persons, O. 49 r. 2(4) is a general provision. It reads:

(4) As soon as the certified copy is ready, the Court shall notify the appellant in Form 141.

The insertion of the said O. 49 r. 2 (4) into O. 55 r. 2 () of the Rules of the High Court 1980 by PU(A) 462/90 clearly covers, in my opinion, all appellants other than those unrepresented by advocates or poor persons. Thus it applies to an appellant who is represented by an advocate. Now, reading O. 55 r. 2 (1) and (2) of the Rules of the High Court 1980 in conjunction with that of O. 49 r. 2(4) of the Subordinate Courts Rules 1980, it appears clear that the Memorandum of Appeal must be filed and a copy therefor served on the respondent/plaintiff within 14 days after service of Form 141 on the appellant who is represented.

For the above reasons, I hold that the Memorandum of Appeal herein dated 31 May 1991 was filed and served out of time, that is, after the expiration of 14 days of service of Notice 141 on the appellant through his advocate. The preliminary point, therefore, succeeds. No extension of time was applied for and obtained for the late filing and service. The appeal, therefore, must and is hereby dismissed with costs to the respondent/plaintiff.

Before concluding, I would add that it seems to me some amendments and re-arrangements of O. 49 of the Subordinate Courts Rules 1980 and O. 55 of the Rules of the High Court 1980 would clear the anomaly and be of convenience to practising advocates and solicitors in complying with the procedural provisions in appeals, for example: the requirement of service of "a copy of the **appeal record**" "**within the like period**" in O. 55 r. 2(2) of the Rules of the High Court 1980 does not seem consistent with O. 49 r. 3A(4) of the Subordinate Courts Rules 1980, respecting service of a copy of appeal record

a within 6 weeks: also, it would appear more convenient that procedural provisions relating to appeals be, as far as possible, grouped under either the High Court Rules or the Subordinate Courts Rules with a general reference of them in the other. As it is, a concerned party has, for example, to refer to the High Court Rules respecting the filing and service of the Memorandum of Appeal and then to the Subordinate Courts Rules on the subsequent filing and service of the Appeal Record.

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